No. 83-838

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

PAUL B. LORENZETTI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In our opening brief, we showed that the plain language, as well as the legislative history and purpose, of 5 U.S.C. 8132 indicate that a federal employee who receives Federal Employees' Compensation Act benefits for injuries suffered in the course of his employment must reimburse the United States out of any damages recovered from a negligent third party. Respondent makes little or no effort to answer most of our arguments. Since many of respondent's contentions were anticipated in our principal brief, only a short reply is required.

1. In our opening brief (at 17-23) we cited a number of cases to show that under federal compensation schemes and most state workers' compensation laws an employer's right to reimbursement is not limited to particular elements of damages and that the right exists even when there has been no duplicate recovery by the employee. Respondent nevertheless asserts, without citation of authority, that the "universal solution" (Br. 6), or the "basic principle" (*id.* at 8), in

this area includes limitation of the employer's lien when the employee himself is unable to recover certain elements of damages in his third party action. Those generalizations are simply unfounded.[1]

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[1]Respondent cites *Bloomer* v. *Liberty Mutual Insurance Co.*, 445 U.S. 74, 79 (1980), a case involving the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, for the proposition that a compensation lien attaches to "any duplicate recovery made in the third party litigation." Resp. Br. 6 & n.2. In *Bloomer* the Court was merely describing the decisions of several lower courts that had read a right of reimbursement into the LHWCA. As we showed in our opening brief (at 18-19), the lower courts have gone on to hold that that right of reimbursement extends to all parts of an employee's third party recovery, including damages for pain and suffering. Respondent's attempt (Br. 14) to distinguish the LHWCA cases on the ground that medical expenses and lost wages were provable items of damages in those cases is unsuccessful. Like respondent, the longshoremen in those cases received damages that failed to cover all of their losses, so that a portion of their damages for pain and suffering was applied to reimburse the employer.

Respondent also attempts (Br. 14-15) to distinguish *United States* v. *Rogers*, 658 F.2d 296 (5th Cir. 1981), which held that the reimbursement provision of the Railroad Unemployment Insurance Act, 45 U.S.C. 362(*o*), requires a beneficiary to reimburse the Railroad Retirement Board in full, despite the fact that the Georgia no-fault statute limits tort liability for automobile accidents. Respondent correctly notes that in Georgia, unlike in other no-fault states, an individual may collect both no-fault benefits and workers' compensation (except when the employer has paid for the no-fault coverage). Ga. Code Ann. § 33-34-8 (1982). The briefs in *Rogers* indicate that the employee in that case did receive both no-fault benefits and compensation under the Railroad Unemployment Insurance Act. However, the court in *Rogers* based its holding solely on the language of the federal statute, which requires reimbursement from "any sum or damages paid or payable" to an employee on account of a tort liability. There is no indication that the court would have construed the statute differently if the employee had not received no-fault benefits (*e.g.*, because the employer had provided the no-fault coverage).

Respondent continues to characterize Section 8132 as involving a right of subrogation and to insist that the government's rights thereunder depend on the beneficiary's ability to recover tort damages for medical expenses and lost wages. But as we pointed out in our opening brief (at 13 n.3), Section 8132 is not a subrogation provision; instead, it simply confers on the federal government the right to be reimbursed from whatever amount an employee is able to recover from a third party in satisfaction of a liability to pay damages for an injury or death. That federal right exists independent of any state law limitation on tort liability in the third party action.[2]

Even if Section 8132 were merely an adjunct to the government's right under 5 U.S.C. 8131 to receive an assignment of an employee's cause of action against a third party, as respondent contends (Br. 7-8 & n.4), the government's right of reimbursement would not be confined to particular elements of the employee's recovery. As we explained in our opening brief (at 15-16), Section 8131 authorizes the Secretary of Labor to require an assignment of the employee's "right of action" and to prosecute or compromise that "cause of action." Since the cause of action encompasses the right to recover for pain and suffering caused by an accident, as well as medical expenses and lost wages, the Secretary under Section 8131 can recover any of these types of damages and remit them to the FECA fund to cover compensation paid to the employee. Section 8132 undoubtedly authorizes a similar result when the employee himself brings the third party action.

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[2]Cf. *United States* v. *Limbs*, 524 F.2d 799, 801 (9th Cir. 1975) (characterizing Section 8132 as conferring a "right to reimbursement" that is analogous to a quasi-contractual right, rather than to a tort claim, for purposes of choosing a limitations period).

2. Section 8132 on its face requires reimbursement from any amount an employee recovers in a third party action, whether the amount represents damages for medical expenses and lost wages or for pain and suffering. See Gov't Br. 13-14; *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d 229, 230 (1981); *United States* v. *Hayes*, 254 F. Supp. 849, 851 (W.D. Ky. 1966). Even the court below recognized that Section 8132, as drafted, appears to permit the government to obtain reimbursement from any part of an employee's recovery. See Pet. App. 6a. Respondent, too, characterizes this as "the most literal interpretation" of Section 8132 (Br. 11).

Respondent purports, however, apparently for the first time in this litigation, to find an ambiguity in the statutory language. He suggests (Br. 11-12) that the term "damages" might be read to include an award for property damage and that our reading of Section 8132 therefore would require an employee to reimburse the FECA fund from, *e.g.*, his award for damage to his automobile.

The new "ambiguity" respondent claims to have discovered does not exist. Under Section 8132, the government's right to reimbursement applies only to amounts an employee receives in satisfaction of a liability based on "an injury or death for which [FECA] compensation is payable." The latter phrase clearly signifies an injury to the person, not any property damage that might occur at the same time as an injury or death.[3]

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[3]Respondent presumably is well aware that the Secretary does not take the position that the right of reimbursement extends to awards for property damage. Form CA-162, on which FECA reimbursement computations are made, provides for an initial deduction from an employee's gross recovery of the amount received for property damage.

Respondent persists in contending (Br. 12-13 & n.7) erroneously that Congress last amended Section 8132 in 1966 and therefore could not have foreseen problems created by no-fault legislation. In our opening

3. Finally, respondent contends (Br. 15) that any administrative burden that might result from the decision below is irrelevant. But, as we explained in our opening brief (at 30-33), Section 8132 should be read in light of Congress's purpose of creating a program the Secretary could administer in a uniform and efficient manner. See, *e.g.*, *Ward* v. *Dep't of Labor*, 726 F.2d 516, 518 (9th Cir. 1984) ("a federal employee's rights under the FECA should not depend upon where in the country he is located"). Cf. *United States* v. *Ferguson*, No. 82-1227 (6th Cir. Feb. 7, 1984), slip op. 9 (quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 309 (1947)) ("to require the United States to comply with the varied insurance regulations of each of the fifty states as a condition to its historic right to obtain compensation for damage to its property would result 'in substantially diversified treatment where uniformity is indicated as more appropriate, in view of the nature of the subject matter and the specific issues affecting the Government's interest' "). Requiring the Secretary to adjust the reimbursement rights of the federal government to accommodate each and every variation of state no-fault law would clearly undermine this legitimate legislative concern.[4]

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brief (at 26-27), we described the 1974 amendment to Section 8132, which granted the government a lien on any third party recovery by an employee. Since the no-fault trend was especially strong in 1974 and the years that immediately preceded, Congress obviously had ample opportunity to modify Section 8132 in response to that trend if it had wished to do so. See Gov't Br. 26-27.

[4]As we explained in our opening brief (at 28-29 n.16, 30-32), each state no-fault scheme is somewhat different. See also King, *State No Fault Systems — Attorney's Guide to Statutory Provisions*, 4 Pace L. Rev. 297 (1984). Moreover, it is not uncommon for states to enact significant amendments to their no-fault statutes, which would make it particularly difficult for the Secretary to adjust the federal program to state law. See Gov't Br. 31-32 n.20 (describing provisions of the 1984 amendments to the New Jersey no-fault statute). In this connection, we

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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APRIL 1984

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note that the Pennsylvania legislature has enacted a new no-fault statute, scheduled to take effect on October 1, 1984. Motor Vehicle Financial Responsibility Law, Pub. L. Nos. 11 and 12 (enacted Feb. 12, 1984) (to be codified at 75 Pa. Cons. Stat. §§ 1701 *et seq.*). The new statute, while not purporting to abolish tort liability, precludes an individual from pleading, introducing into evidence, or recovering the amount of required no-fault benefits paid or payable (*id.* § 1722).

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